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Supreme Court, U.S.
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No. 87-1498

IN THE
Supreme Court of the United States
October Term, 1987

LORAN W. ROBBINS, MARION M. WINSTEAD, ROBERT S. SANSONE, R. JERRY COOK, HOWARD McDOUGALL, ROBERT J. BAKER, R.V. PULLIAM, SR., AND ARTHUR H. BUNTE, JR., TRUSTEES OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

Cross-Petitioners,

v.

IOWA ROAD BUILDERS COMPANY and EASTER ENTERPRISES, INC. d/b/a ACE LINES, INC.,

Cross-Respondents.

CROSS-RESPONDENTS' RESPONSE IN OPPOSITION TO CROSS-PETITIONERS' CONDITIONAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND APPENDIX

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19 pp

QUESTION PRESENTED

DOES A CHOICE OF LAW PROVISION IN THE TRUST INDENTURE OF A TAFT-HARTLEY FUND WHICH SELECTS THE SUBSTANTIVE LAW OF THE FUND'S SITUS HAVE THE EFFECT OF ALSO REQUIRING THE PROCEDURAL LAW OF THAT SITUS STATE TO BE USED IN ACTIONS BROUGHT IN FOREIGN JURISDICTIONS UNDER §301 LMRA and §515 ERISA TO COLLECT EMPLOYER CONTRIBUTIONS TO THE FUND?

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AND

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AND

Central States in its Cross-Petition for Writ of Certiorari, seeks an advisory opinion of this Court outside of the existing case or controversy.

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Petitioner and Cross-Respondent, Easter Enterprises, Inc. d/b/a Ace Lines, Inc. (hereinafter referred to as "Ace Lines") pursuant to the Rules of this Court and the directive of this Court dated May 10, 1988 hereby submits this Response in Opposition to the Conditional Petition For Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit filed by the Respondents, Central States, herein.

RESPONDENTS' STATEMENT OF THE CASE

Ace Lines, Inc. rejects Central States' statement of the case contained in its combined case statement and argument. Rather than attempt to thresh out Central States' statement of the case from the argument, Ace Lines elects to incorporate by this reference, its statement of the case as set forth in its own Petition for Writ of Certiorari filed on February 19, 1988. In the light of Central States' Cross-Petition, the only supplement that needs to be made is to note that on January 23, 1985,[1] United States Magistrate R.E. Longstaff applied the Iowa two-year wage payment and benefit collection statute of limitations to Central States' attempt to amend its complaint and ruled that Central States could not assert ERISA withdrawal liability without first arbitrating the matter.

REASONS NOT TO GRANT CENTRAL STATES' PETITION

1. No identifiable reason recognized by this Court has been asserted by Central States for granting its Conditional Cross-Petition for Writ of Certiorari.

2. There is no split among the Circuit Courts of Appeal on the issue which Central States seeks an opinion in its Cross-Petition For Writ of Certiorari.

3. Central States in its Cross-Petition for Writ of Certiorari, seeks an advisory opinion of this Court outside of the existing case or controversy.

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[1]The Magistrate's opinion is reprinted in Ace Lines' Appendix hereto. The Magistrate's decision is referred to in the decision of the Court of Appeals for the Eighth Circuit in *Robbins v. Iowa Road Builders, et al.*, at p. 8a of the Appendix filed therein in support of Ace Lines' Petition for Writ of Certiorari.

ARGUMENT

1. ***No identifiable Reason Asserted by Cross-Petitioner For Granting the Writ of Certiorari.*** Central States, in its Conditional Cross-Petition for Writ of Certiorari, assiduously avoids identifying any specific reason or reasons that would justify the granting of the requested writ of certiorari under Sup. Ct. R. 17.[2]

Failure of the Cross-Petitioner to articulate a reason or reasons for granting the writ under Sup.Ct.R. 17 does not impose on Cross-Respondent a burden to demonstrate that no reason exists. Rather, the Cross-Petition should simply be denied for failure to state a recognized reason for granting the writ. To prevail in its opposition to the granting of the writ, Cross-Respondent is not required to do more than resist on the basis of the failure of the Cross-Petition to comply with Sup.Ct.R. 17 by identifying a specific reason or reasons that would justify granting of the requested writ of certiorari.

2. ***There Is No Split Among The Circuit Courts of Appeal on The Issue On Which Cross-Petitioner Seeks The Opinion Of This Court.*** Central States alleges it has filed a Conditional Cross-Petition for Writ of Certiorari, "in order to preserve its ability to argue the specific question *whether parties to a multiemployer employee benefit trust can [sic] select the 'most appropriate' statute of limitations by contractual agreement.*" C.S. Cross-Petition pp. 6-7. (Emphasis added)

In its Conditional Cross-Petition, Central States does not cite any United States Court of Appeals decision which either supports or rejects Central States' position on the issue on

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[2]This also constitutes failure to comply with Rule 21.1(j) of this Court.

which it now[3] seeks this Court's opinion. Indeed, Central States fails to cite *any* federal case that decides the issue Central States here seeks to raise. The best the Cross-Petition does in citing a case in point is:

> [f]orum selection clauses having the same practical effect as an agreement upon the statute of limitations were upheld by this Court as *prima facie* valid. *The Bremen v. Zapta Off-Shore Co.*, 407 U.S. 1 (1972) (case arising under federal admiralty law).

Conditional Cross-Petition, p. 5.

This use of *The Bremen v. Zapta Off-Shore Co.*, 407 U.S. 1 (1972) (case arising under federal admiralty law) by Central States is significant in two respects. First, it is a serious distortion of *Bremen* [4]. Second it is a forceful demonstration of the

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[3]Central States' issue statement contained in its Conditional Cross-Petition For Certiorari is based upon the trust agreement language in effect *after* March of 1985, while its arguments in this case as to its 1983 complaint and its 1984 proposed amendment are based upon the trust agreement language in effect *prior* to March of 1985. See footnote 2 in the Central States Conditional Cross-Petition for Writ of Certiorari at p. 3.

[4]*Bremen* does not involve the issue of the selection of the correct statute of limitations. It does involve the issue of whether parties to a contract involving the towing of complex machinery across "thousands of miles" of sea may provide in their contract that the London Court of Justice may adjudicate any disputes that arise. To argue, that by analogy, this Court in *Bremen* has approved contract clauses allowing parties to lengthen applicable statutes of limitations, shows just how far Central States had to reach to attempt to assert that there is some basis for this Court to grant the requested writ of certiorari. Even if one were to completely swallow Central States' analogy and consider it to be a good one there is a serious flaw. In *Bremen* this court did not say that the parties could by contract "oust" the United States courts of jurisdiction, but only that they could confer jurisdiction on the London Court of Justice. 407 U.S. 12. More significant for current purposes, however, is the Court's rationale for its holding. "There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or over-

complete lack of any split[5] in the circuits on the issue which Central States now seeks to raise and the extreme paucity of cases even remotely dealing with this issue. Certainly, the issue cannot be said to be one of immediate judicial concern or attention. The absence of cases dealing with it, is convincing evidence of this.

Ace Lines, as Cross-Respondent, is not obligated to undertake to demonstrate that every known reason for granting a writ of certiorari that is listed in Sup.Ct.R. 17 is not present here.

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weening bargaining power, such as that involved here, should be given full effect." 407 U.S. 12-13. In no way can Central States' Trust indentures be said to be "a freely negotiated private international agreement unaffected by . . . overweening power." Under MEPPAA, Central States can impose on employers who do not agree to changes in its trust indentures, withdrawal liability into the millions of dollars. Any employer who does not "agree" to the change can be rejected by Central States and that triggers the withdrawal liability. If this is not "overweening power" it is hard to imagine what would be. Also, although Central States' reach is large, it is probably fair to say its trust indentures are not fundamentally "international" in character.

[5]In its Petition For Writ of Certiorari, Ace Lines relies, in part, on the split in the decisions of the Circuit Courts of Appeal. Two Circuit Courts of Appeal have decided cases involving the "borrowing" of state wage payment and benefit collection statutes of limitation. They are the Third Circuit in *Byrnes v. DeBolt Transfer, Inc.*, 741 F.2d 620 (3rd Cir. 1984) and *Teamsters Pen. Tr. Fund v. John Tinney Deliv. Serv.*, 732 F.2d 319 (3rd Cir. 1984) and the Eighth Circuit in the current case, styled as *Robbins v. Iowa Road Builders, et al.*, 824 F.2d 1348 (8th Cir. 1987). The Sixth and Ninth Circuits have also decided cases involving the appropriate statute of limitations to be borrowed in §301 LMRA and §515 ERISA cases for collection of contributions to employee benefit funds. Those cases, however, involved Tennessee, Alaska and Hawaii, none of which had a separate wage payment and benefit collection statute of limitation. All three states also make no distinction in their statutes of limitations between oral contracts and those that are in writing.

[6]See discussion at p. 3 of this response in opposition.

3. ***Central States Seeks An Advisory Opinion Not An Adjudication Of An Actual Case Or Controversy.*** United States Magistrate R.E. Longstaff on January 23, 1985, ruled that in accord with *Teamsters Pen. Tr. Fund v. John Tinney Deliv. Serv.*, 732 F.2d 319 (3rd Cir. 1984) the Iowa two-year wage payment and benefit collection statute of limitations was applicable to the proposed amended complaint that Central States sought to file on November 8, 1984, raising new interpretive issues. Central States responded: 1) by appealing the magistrate's ruling and 2) by amending, in March 1985, its trust indentures. Prior to March 1985 the trust indentures provided:

> This Agreement shall in all respects be construed according to and governed by the laws of the State of Illinois, including but not limited to the laws applicable to the rate of interest in the State of Illinois, except as such laws may be preempted by the laws and regulations of the United States.

Article XIV Section 7 of the Trust Agreement governing the Pension Fund and Article XI, Section 7 of the Trust Agreement governing the Health and Welfare Fund all as quoted in footnote 2 page 3 of Central States' Conditional Cross-Petition For Writ of Certiorari.

Following the Magistrate's decision in this case on January 23, 1985, Central States, in March of 1985, amended its trust indentures to add the language in italics below:

> This Agreement shall in all respects be construed according to and governed by the laws of the State of Illinois, including but not limited to the laws applicable to the rate of interest in the State of Illinois, except as such laws may be preempted by the laws and regulations of the United States. *In all actions taken by the Trustees to enforce the terms of this Trust Agreement, including but not limited to actions to col-*

> *lect delinquent contributions from employers or to conduct audits of contributing employers' records as authorized by Article III of this Agreement, the ten-year Statute of Limitations applicable to actions on written contracts in the State of Illinois shall apply.*

Footnote 2 page 3 of Central States' Conditional Cross-Petition For Writ of Certiorari.

On appeal to United States District Court Judge William Stuart, Central States argued that the language in the trust agreements prior to the amendment of March 1985 had the effect of requiring the District Court to apply the Illinois procedural law to this action which Central States had commenced in Iowa. Judge Stuart concluded:

> Although plaintiffs' right to institute this lawsuit is derived from ERISA and the Trust Agreements, the gravamen of plaintiffs' complaint is defendant's alleged failure to comply with its obligations under the collective bargaining agreements. Consequently, the Court agrees with defendant that the Illinois law proviso of the trust agreements is *inapposite*.

Appendix to Ace Lines' Petition for Writ of Certiorari, p. 25a.

Upon appeal to the United States Court of Appeals for the Eighth Circuit, Central States again advanced its argument that the language of the trust agreements, in effect prior to March of 1985, required the U.S. District Court sitting in Iowa to apply the Illinois procedural law to the action brought in that Court in 1983 by Central States and to the amended complaint which it sought to file in 1984. The Court of Appeals, while reversing the district court on which Iowa statute of limitations to apply, sustained the district court in rejecting Central States' Illinois contract theory.

> Appellant's complaints alleged claims for breach of the trust agreements pursuant to ERISA §302(a), 29 U.S.C. §1132(a). This statute provides a basis for federal jurisdiction, and a federal forum, for these claims. *See Schneider Moving*, 466 U.S. at 366 n.2. Because an action to collect delinquent fund contributions states a federal cause of action, appellants' arguments about the choice of law provision in the trust agreements and the conflicts of laws principles, arguments which are premised upon diversity jurisdiction, are ***inapposite***. *Central States, Southeast & Southwest Areas Pension Fund v. Kraftco, Inc.*, 799 F.2d 1098, 1105 n.5 (6th Cir. 1986) (banc) (Kraftco), *cert. denied*, 107 S.Ct. 1291 (1987).

Robbins v. Iowa Road Builders, Appendix p. 11a. (Footnote omitted) (emphasis added).

Both the District Court and the Court of Appeals rejected as "inapposite" Central States' argument that the trust agreement language in effect prior to March of 1985 mandated the United States District Court sitting in Iowa to apply Illinois procedural law to this action which Central States elected to bring in the United States District Court for the Southern District of Iowa. It is true, that after the magistrate ruled adversely to Central States in January of 1985, it did, in March of that year, modify its trust agreement language in an attempt to negate the future effect of rulings such as the magistrate's. Central States has not argued below[7] and does not argue in

[7]At page 7 of its brief in resistance to Ace Lines Petition for Writ of Certiorari, Central States sets forth a case holding that a party may not raise here issues not raised below.Central States, in its argument, overlooks the fact that the issue of the ERISA three- and six-year statutes of limitations was raised in Ace Lines' Petition for Rehearing, which like Central States own petition for rehearing, was denied. The point is, that Central States recognizes that it cannot here assert for the first time, some theory of retroactive application of the March 1985 trust indenture modifica-

its Conditional Cross-Petition that the language change in March of 1985 somehow retroactively changes the law and agreements in effect at the time Central States commenced this action in 1983 or sought to amend its complaint in 1984.

What Central States, by its Conditional Cross-Petition, is seeking is an advisory opinion as to the future applicability and validity of its amended trust agreement language for cases that arise after the language was changed in 1985. To Central State's credit, it virtually admits in its petition that an advisory opinion is what it seeks.

> Hence, the enforceability *vel non* of the 'choice of law' provision is an issue of utmost practical significance to the Central States Funds (and to the Trustee of other funds who may likewise wish to facilitate a uniform remedy through the vehicle of the fund's agreements).

Conditional Cross-Petition p. 6.

While Central States' candor, in apparently admitting it seeks an advisory opinion is refreshing, it does not provide a basis for granting a writ of certiorari where one does not otherwise exist. The reality is and remains that Central States failed to articulate, in its Cross-Petition, a recognized reason for granting certiorari, not through oversight, but because no such reason exists.

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tion. Ace Lines does not consider that Central States has attempted to make such an argument and, indeed, such an argument would not only fail as being timely, but even if considered on its merits would be found to have none, since not even Central States can point to any language in the amendment purporting to confer retroactive effect to lawsuits already commenced.

CONCLUSION

Ace Lines will concede that it would be of use to Central States to have this Court render an advisory opinion as to whether Central States' trust agreement amendments of March 1985 will accomplish the purpose which Central States says it seeks in its Conditional Cross-Petition: namely, establishing an uniform statute of limitations through imposing, by alteration of its trust indentures, the Illinois ten-year statute of limitations for written contracts.

Such a view of the role of Central States is not only arrogant but leads to a serious misperception of the requirements for obtaining a writ of certiorari in this Court.

The bold assertions of Central States demonstrate that delay in granting Ace Lines' Petition for Writ of Certiorari will needlessly provoke further litigation and forum shopping. Alternatively, granting the Conditional Cross-Petition for Writ of Certiorari will simply compel Ace Lines to litigate an issue in this Court not raised in the lower courts and will materially weaken this Court's standards for the granting of the writ.

The matter raised by Ace Lines in its Petition for Writ of Certiorari, is currently being addressed by federal courts throughout the nation with no common rationale or uniformity of result as is so essential in statutes of limitation cases. Particularly this is true where, as here, the sums at stake are of such substantial magnitude for so many. Conversely, Central States' theory, as advanced in its Conditional Cross-Petition, is not now the subject of significant litigation. That it might become such in the future is not a basis for abandoning this Court's standards for when certiorari shall be granted

and for imposing on Ace Lines a duty to argue theories and language not relevant to its case.

Respectfully submitted,

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June 9, 1988

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

LORAN W. ROBBINS, et al.,	)	
	)	
Plaintiffs,	)	CIVIL NO. 83-687-B
	)	
vs.	)	ORDER
	)	
EASTER ENTERPRISES, INC., d/b/a ACE LINES, INC.,	)	
	)	
Defendant.	)	

This matter is now before the Court upon the motion of the plaintiffs seeking to file a first amended and substituted complaint. The motion was filed November 8, 1984 with a resistance being filed November 14, 1984. The proposed amended complaint was then submitted to the Court and defendant filed a brief in support of its resistance on January 4, 1985. Plaintiffs then filed a brief in support of its motion on January 15, 1985. The matter was orally argued in front of the undersigned Magistrate on January 10, 1985. Appearing at the argument were Paul Zoss on behalf of the plaintiffs and John Black and David Goldman on behalf of the defendant.

Plaintiffs' proposed amended complaint presents several difficult issues pertaining to the proper statute of limitations, the tolling thereof, and whether certain matters are subject to mandatory arbitration proceedings. After carefully reviewing the briefs submitted by the parties and the arguments made on January 10, 1985, the Court finds as follows:

1. Plaintiffs' claim for contributions being asserted in Count I of the amended complaint is controlled by the two-year statute of limitations contained in Section 614.1(8) of the Iowa Code. *Teamsters Pen. Tr. Fund v. John Tinney Deliv. Serv.*, 732 F.2d 319 (3rd Cir. 1984). Accordingly, plaintiffs' claims being asserted in Count I should be limited to the time period extending two years from the date this action was originally filed unless plaintiffs wish to claim the applicable statute of limitations has been tolled.

2. If plaintiffs intend to assert a tolling of the two-year statute of limitations, which is the position they appear to assert in their brief filed January 15, 1985, Count I of their amended complaint may include that period of time which plaintiffs' claim is covered by the tolling provision. In making this assertion, however, plaintiffs must be aware that although they claim defendant's reporting obligation is based on contract and characterized that reporting duty as a fiduciary status, it is equally important to note that the same contract gives the plaintiffs the right to conduct periodic audits. Accordingly, if plaintiffs did not conduct those audits with due diligence, the plaintiffs will have a difficult time supporting their tolling assertion. However, because of the lack of a factual record at this stage of the litigation and the fact that the Court is now simply ruling on a motion to amend, it would be inappropriate for the Court to make a judgment at this juncture as to what would be an appropriate date to permit plaintiffs to extend defendants' liability through its tolling assertion.

3. In Count II of the amended complaint, plaintiffs are asserting that defendant has withdrawn from their pension plan and, under the withdrawal provisions of ERISA, defendant is now liable for a substantial withdrawal payment. The Magistrate finds that this claim cannot be asserted without submitting the matter to arbitration. *Republic Industries, Inc. v. Cen-*

tral Pennsylvania Teamsters Pension Fund, 693 F.2d 290, 294 (3rd Cir. 1982); *Republic Indus. v. Teamsters Joint Council No. 83 Pension Fund*, 718 F.2d 628, 634 (4th Cir. 1983). Accordingly, the Court finds that at the present time, Count II does not state a claim for relief and the plaintiffs' motion to amend insofar as it seeks to add Count II will be denied.

4. In view of the fact that the Court has partially allowed plaintiffs to amend as set forth above, the Court finds that substantial new issues have been added to this litigation and the case should be removed from the April 15, 1985 trial calendar. The final pretrial conference scheduled for March 21, 1985 shall now be held as a scheduling conference. Plaintiffs shall submit an amended complaint conforming to the direction provided above within 20 days.

IT IS SO ORDERED.

Dated this 23rd day of January, 1985.

/s/ R.E. Longstaff
R.E. LONGSTAFF
U.S. MAGISTRATE

FILED
JAN 23 1985
4:45 PM
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA